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DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

No. 881, Civil

MIAMI TRANSPORTATION COMPANY, INC., OF INDIANA, A CORPORATION,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION

JURISDICTIONAL STATEMENT

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1. The jurisdiction of the Supreme Court of the United States to entertain this appeal is believed to be sustained by Act of Congress of March 3, 1911, Chapter 231, Sec. 210, 36 Stat. 1150, and by Act of Congress of October 22, 1913, Chapter 32, 38 Stat. 220, United States Code, Title 28, Sec. 47a, being Section 210 of Judicial Code.

2. The final judgment sought to be reviewed was entered in the above entitled action on August 14, 1947, and the application of plaintiff for appeal was presented on August 18, 1947.

3. This action does not involve the validity of any statute of any State or of any statute or treaty of the United States.

4. The nature of this case and action, the nature of the rulings of the court which were such as to bring this case within the jurisdictional provisions relied upon, a statement of the grounds upon which it is contended that the questions involved are substantial, and citations to the cases believed to sustain the jurisdiction, are next set forth under paragraphs hereof indicated (a), (b), (c) and (d), respectively, to-wit:

(a) Nature of the case.—The action, instituted January 8, 1945, in the District Court of the United States for the Southern District of Indiana, is one in which the plaintiff, Miami Transportation Company, Inc. of Indiana, an Indiana corporation, seeks to obtain interlocutory and permanent injunctions to vacate, set aside and enjoin the enforcement of a certain order of the Interstate Commerce Commission entered September 27, 1944, in its Docket No. MC 22305 entitled Lett & Company of Indiana, Incorporated, Common Carrier Application. The vacation of said order of the Interstate Commerce Commission and restraint of its enforcement are sought upon the grounds that said order deprives plaintiff of its property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States. This action arises under the Fifth Amendment to the Constitution of the United States, and under the laws of the United States, and more particularly under 54 Stat. 916, being Section 17 (9) of Part I of the Interstate Commerce Act, United States Code, Title 49, Sec. 17(9); and Section 205(g) of Part II of the Interstate Commerce Act (Acts of Congress August 9, 1935, Ch. 498, 49 Stat. 548, and amended June 29, 1938, Ch. 811, Sec. 507, 52 Stat. 1237, 1238; United States Code, Title 49, Sec. 305(g); and Act of Congress October 22, 1913, Ch. 32, 38 Stat. 219, 38 Stat. 220, United States Code, Title 28, Secs. 41(28), 43-48, 45a and 47a. Said applications for

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interlocutory and permanent injunctions were presented to the United States District Court for the Southern District of Indiana and to the Honorable Robert C. Baltzell, Judge thereof, who thereupon and conformably with the provisions of the Act of Congress of October 22, 1913, Ch. 32, 38 Stat. 220, called to his assistance to hear and determine said applications the Honorable Evan A. Evans, Circuit Judge, and the Honorable Walter C. Lindley, District Judge. Answers were filed by the defendants. The matter was set for trial in the United States District Court for the Southern District of Indiana on March 1, 1945. Before the trial and hearing was held, the defendant Commission reopened the case for reconsideration on the existing record, and hearing in the District Court set for March 1, 1945 was taken off the trial docket calendar by stipulation. Thereafter, the defendant Commission rescinded the order reopening the case on the existing record and reopened the proceedings limited solely to an inquiry concerning the relationship existing between Miami Transportation Company, an affiliated Ohio corporation. The relationship between these two companies had at all times been freely admitted by the plaintiff. Following these further proceedings no change of any kind was made by the Interstate Commerce Commission in its order of September 27, 1944 complained of in the original complaint filed in the District Court. On February 10, 1947 the plaintiff exhausted its remedies before the Interstate Commerce Commission when a final petition for reconsideration was denied. With the permission of the District Court, the plaintiff filed its supplemental complaint bringing down to date historically the proceedings in this case subsequent to March 1, 1945. Numerous extensions of the effective date of the order complained of were made by the Interstate Commerce Commission, the last extension expiring August 15, 1947.

On June 5, 1947 hearing on the merits and argument was had, and the case submitted to the district court. Briefs were filed by the parties, and on August 14, 1947 the district court filed its Special Findings of Fact and Conclusions of Law in this case, and entered a judgment that this cause be dismissed for want of equity, which findings of fact, conclusions of law and judgment are attached hereto and made a part hereof by reference. The decision of the court was made by the Honorable Evan A. Evans, Circuit Judge, and the Honorable Robert C. Baltzell, District Judge. The Honorable Walter C. Lindley, District Judge, dissented in part and concurred in part in a separate opinion, a copy of which is attached hereto, marked Appendix A, and made a part hereof by reference.

(b) The rulings of a majority of a Statutory Three-Judge Court which heard the case were such as to bring the case within the jurisdictional provisions relied upon because said ruling dismissed the case for want of equity, and said final judgment of said court denied plaintiff a permanent injunction enjoining the enforcement of said order of the Interstate Commerce Commission approved September 27, 1944, entitled Lett & Company of Indiana, Incorporated, Common Carrier Application. In making its decision, the district court and the Interstate Commerce Commission failed to give any consideration whatsoever to more than 160,000 original shipping records and the testimony of officers and employees of plaintiff or its predecessor in interest, showing that the operations had been performed transporting commodities generally by motor vehicle in interstate and foreign commerce over the routes and in the territory involved, on, before and continuously since June 1, 1935.

(c) The questions involved are substantial in that the case involves the right of plaintiff to continue a lawful busi-

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ness which has been in continuous existence either as operated by plaintiff or its predecessor in interest since prior to June 1, 1935. The petition for appeal alleges that the gross revenue of plaintiff is approximately $500,000.00 a year, and that the value of the business is approximately $500,000.00, and that the plaintiff furnishes employment to approximately ninety employees. The cases showing the questions involved to be substantial are:

Michigan Pub. Util. Comm. v. *Duke*, 266 U. S. 570, 69 L. Ed. 445;

Buck v. *Kuykendall*, 267 U. S. 307, 69 L. Ed. 623;

Bush & Sons Co. v. *Maloy*, 267 U. S. 317, 69 L. Ed. 627;

Frost Trucking Co. v. *Railroad Com.*, 271 U. S. 585, 70 L. Ed. 1101;

Smith v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264;

Allen v. *Galveston Truck Line Corp.*, 289 U. S. 708, 77 L. Ed. 1463.

(d) The cases believed to sustain the jurisdiction of the Supreme Court of the United States to entertain this appeal are:

United States v. *Carolina Freight Carriers Corp.*, 315 U. S. 475;

Baltimore and Ohio R. Co. v. *United States* (1936), 298 U. S. 349, 80 L. Ed. 1209;

St. Joseph Stockyards v. *United States* (1936), 298 U. S. 38, 56 Sup. Ct. Rep. 120, 80 L. Ed. 1033;

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Pacific Tel. & Tel. Co. v. *Kuykendall*, 265 U. S. 196, 68 L. Ed. 975;

Michigan Public Utilities Commission v. *Duke*, 266 U. S. 570, 69 L. Ed. 445;

Buck v. *Kuykendall*, 267 U. S. 307, 69 L. Ed. 623;
In re Buder, 271 U. S. 461, 70 L. Ed. 1036;
Interstate Busses Corp. v. *Holyoke Street R. Co.*, 273 U. S. 45, 71 L. Ed. 530;
Clark v. *Poor*, 274 U. S. 354, 71 L. Ed. 1199;
Morris v. *Duby*, 274 U. S. 135, 71 L. Ed. 966;
Interstate Busses Corp. v. *Blodgett*, 276 U. S. 245, 72 L. Ed. 551;
Continental Baking Co. v. *Woodring*, 286 U. S. 352, 76 L. Ed. 1155;
Kroger Grocery & Baking Co. v. *Lewis* (heard and reported with *Steward Dry Goods Co.* v. *Lewis*), 287 U. S. 9, 77 L. Ed. 135;
Allen v. *Galveston Truck Line Corporation*, 289 U. S. 708, 77 L. Ed. 1463;
Spielman Motor Sales Co. v. *Dodge*, 295 U. S. 89, 79 L. Ed. 1322;
Bingaman v. *Golden Eagle Western Lines*, 297 U. S. 626, 80 L. Ed. 928;
South Carolina State Highway Department v. *Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 469.

5. It is claimed that the majority of the Statutory Three-Judge Court abused its discretion in denying the permanent injunction aforementioned in that said court erred in refusing to give any consideration whatsoever to uncontradicted documentary evidence and uncontradicted oral evidence showing the plaintiff and its predecessor in interest had been in continuous operation over the routes and in the territory involved on, before and continuously since June 1, 1935. It is further claimed that the majority of the district court erred in finding that there was substantial evidence to sustain the order of the Interstate Commerce Commission when in fact there was no evidence whatsoever to sustain said order as to the routes and territory involved.

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6. The plaintiff appends hereto, marked "Appendix A," a copy of the Special Findings of Fact and Conclusions of Law and the Judgment of the majority of the Statutory Three-Judge Court dated, filed and entered August 14, 1947, which by the terms and provisions of the final judgment appealed from, constitutes the sole grounds for the court taking the action and making the rulings and decisions complained of upon this appeal. The plaintiff also appends hereto, marked "Appendix B," a copy of the separate opinion of District Judge Lindley, who dissented in part and concurred in part with the decision of the district court. No other opinions were issued in this case.

(Signed) Howell Ellis,
520 Illinois Building,
Indianapolis, Indiana,
Attorney for Plaintiff.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

No. 881. Civil

MIAMI TRANSPORTATION COMPANY, INC., OF INDIANA, a Corporation

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION

Before the Honorable Evan A. Evans, Circuit Judge and the Honorable Robert C. Baltzell and Walter C. Lindley, District Judges

This cause coming on to be finally heard by the Court, and the parties appearing by their respective attorneys, and the Court having heard the evidence and argument of counsel and being sufficiently advised in the premises, now, pursuant to Rule 52 of the Rules of Civil Procedure signs and files herein its special findings of fact and states its conclusions of law thereon, which said special findings of fact and conclusions of law are signed by the Honorable Evan A. Evans and the Honorable Robert C. Baltzell, and are ordered by the Court filed and made a part of the record in this cause, and the Honorable Walter C. Lindley now files herein his opinion, concurring in part and dissenting in part, which said opinion is ordered filed herein.

Upon the foregoing Special Findings of Fact and Conclusions of Law, it is now

Ordered, Adjudged and Decreed by the Court:

1. That the plaintiff's bill of complaint be, and the same is, hereby dismissed for want of equity.

2. That the defendants recover of and from the plaintiff their costs herein taxed at $——.

—— ——, Circuit Judge; —— ——, District Judge; —— ——, District Judge.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

Civil Action No. 881

MIAMI TRANSPORTATION COMPANY, INC., OF INDIANA, a Corporation

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION

Special Findings of Fact

Pursuant to Rule 52 of the Rules of Civil Procedure, the Court now states its Special Findings of Fact, as follows:

I

That this is a suit under Sections 41 to 48, inclusive, United States Code, Title 28, to set aside and annul an order of the Interstate Commerce Commission (hereinafter referred to as the Commission), dated September 27, 1944, in a proceeding entitled Lett & Company of Indiana, Incorporated, Common Carrier Application, Docket No. MC-22305; that the report and order also embraced Docket No. MC-52743 (Sub-No. 2), Miami Transportation Company, Inc., of Indiana, successor in part to Lett & Company of Indiana, Incorporated Common Carrier Application.

II

That on February 12, 1936, plaintiff's predecessor, Lett & Company of Indiana, Incorporated, filed an application with the Commission under Section 206(a) of the Interstate Commerce Act, Section 306(a) United States Code, Title 49; that by the application plaintiff's predecessor sought a "grandfather" certificate of public convenience and necessity authorizing continuance by it of operations in interstate or foreign commerce as a common carrier by motor vehicle of general commodities, with certain exceptions, between points in Indiana, Ohio, West Virginia, Pennsylvania, New York, Missouri, Virginia, North Carolina,

Illinois, Kentucky, Maryland, and the District of Columbia over regular and irregular routes; that numerous rail and motor carriers opposed the application. That a hearing was held by the Commission on the application and other proceedings and, that on September 23, 1940, the Commission entered an order granting the application in part and denying it in part.

III

That the applicant, Lett & Company of Indiana, Incorporated, filed its petition for rehearing on that part of the application which was denied by the order of September 23, 1940; that on January 17, 1941, the Commission entered an order reopening the case and specifically limiting the issues in the reopened proceedings to the transportation of general commodities over the following territory, to-wit:

Between Cincinnati, Ohio and Pittsburgh, Pa., over U. S. Highway 22, serving all intermediate points.

Between Cincinnati, Ohio and Pittsburgh, Pa., over Ohio Highway 4 from Cincinnati to Middletown, Ohio, thence Ohio Highway 73 to its junction with U. S. Highway 25, thence over U. S. Highway 25 to Dayton, Ohio, thence over Ohio Highway 4 to its junction with U. S. Highway 40, thence over U. S. Highway 40 to Columbus, Ohio, thence over Ohio Highway 16 to Coshocton, Ohio, thence over U. S. Highway 36 to Cadiz, thence over U. S. Highway 22 to Pittsburgh, Pa.

Between Cincinnati, Ohio and Pittsburgh, Pa., over U. S. Highway 50 from Cincinnati to Clarksburg, W. Va., thence over U. S. Highway 19 to Morgantown, W. Va., thence over U. S. Highway 119 to Uniontown, Pa., thence over Pennsylvania Highway 51 to Pittsburgh, Pa., serving all intermediate points.

Between Delaware, Ohio and Portsmouth, Ohio, over U. S. Highway 23.

Between Charleston and Weirton, W. Va., over U. S. Highway 21 from Charleston to Parkersburg, thence over West Virginia Highway 2 to Weirton.

Between Indianapolis, Ind. and Cleveland, Ohio, over U. S. Highway 36 from Indianapolis to Pendleton, Ind.,

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thence over Indiana Highway 9 to Anderson, thence over Indiana Highway 32 to Muncie, Ind., thence over Indiana Highway 3 to Hartford City, Ind., thence over Indiana Highway 22 to Jonesboro, Ind., thence over U. S. Highway 35 to its junction with Indiana Highway 9, thence over Indiana Highway 9 to Huntington, Ind., thence over U. S. Highway 24 to New Haven, Ind., thence over U. S. Highways 30 and 30S to Mansfield, Ohio, thence over U. S. Highway 42 to Cleveland, Ohio.

Off-route service to all points in the St. Louis, Mo. commercial zone; all points in the Cincinnati, Ohio commercial zone; Speedway City and Fort Benjamin Harrison, Ind.; all points within 25 miles of Charleston, W. Va.; all points within 25 miles of Cleveland, Ohio; and all points within 35 miles of Pittsburgh, Pa.

That further hearings were held by the Commission on that portion of the application involved in the reopened case, and other proceedings had.

IV

That while the reopened proceedings were pending before the Commission, the original applicant, Lett & Company of Indiana, Incorporated, was declared bankrupt by the District Court of the United States for the Southern District of Ohio, Western Division, and Louis R. Schear was appointed operating trustee to continue the business.

V.

That arrangements were made to sell a part of the operating rights of Lett & Company of Indiana, Incorporated, to two other carriers, to-wit: Consolidated Forwarding Company, Inc., and Kenneth G. Foster, doing business as Foster Freight Lines; that the sale of a part of the operating rights to these carriers was approved by the Commission in its docket No. MC-F-1648, decided March 6, 1942. That in November, 1941, arrangements were made for the sale of the remaining portion of the operating rights of Lett & Company of Indiana, Incorporated, both confirmed and claimed, to the plaintiff, Miami Transportation Com-

pany, Inc. of Indiana; that this transaction was approved by the Commission in its docket No. MC-F-1719, decided May 30, 1942. That the plaintiff acquired all of the operating rights of Lett & Company of Indiana, Incorporated, involved in the reopened proceedings in Docket No. MC-22305 except off-route service to points in the St. Louis, Missouri commercial zone.

VI

That on May 22, 1943, the Commission issued its second report and order wherein it authorized operations similar to those granted in its first report and order of September 23, 1940; that this second order divided the operating authority in accordance with the respective shares of the three purchasers heretofore referred to. That as to the plaintiff, the authority to operate over one of the routes, viz., the route between Cincinnati, Ohio and Charleston, West Virginia, was granted only to the extent that this route was not already held by Miami Transportation Company of Ohio, an affiliated Ohio corporation; that the curtailment as to the authorization over this route was done for the purpose of eliminating duplicate operations by one transportation enterprise.

VII

That on November 26, 1943, a further hearing was held on the application for the purpose of affording the plaintiff an opportunity to submit additional proof; that no such evidence was submitted. That after further consideration the Commission issued its third report and order, dated September 27, 1944, which was attacked by the plaintiff in this suit.

VIII

That on July 6, 1945, a further hearing was had on the application for the purpose of determining whether the plaintiff and Miami Transportation Company of Ohio were commonly owned and controlled and whether the said companies were being conducted as one transportation business or as separate businesses; that as a result of this hearing, no change was made in the order of September 27, 1944.

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IX

That on January 8, 1945, the plaintiff filed its complaint in this court for an injunction against the enforcement of the order of September 27, 1944; that through a succession of orders the effective date of the order complained of has been extended by the Commission to August 15, 1947.

X

That there was substantial evidence to support the finding of the Commission that the plaintiff was not entitled to a certificate of public convenience and necessity authorizing operations over the routes denied to it by the order complained of.

XI

That there was substantial evidence to support the finding of the Commission that the plaintiff and Miami Transportation Company of Ohio were one transportation enterprise.

____ ____,
United States Circuit Judge, presiding

____ ____,
United States District Judge

____ ____,
United States District Judge

Dated this ____ day of _____, 1947.

Conclusions of Law

Upon the above and foregoing Special Findings of Fact, the Court now states its Conclusions of Law, as follows:

I

That there is substantial evidence to support the Commission's findings; that the order of the Commission, dated September 27, 1944, is not unlawful, arbitrary, capricious or discriminatory; that the law and the equities are with the

defendants; and that the complaint should be dismissed for want of equity.

II

That the defendants should recover of and from the plaintiff herein their costs taxed at $————.

——— ———,
United States Circuit Judge, presiding

——— ———,
United States District Judge

——— ———,
United States District Judge

Dated this —— day of ————, 1947.

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

Civil Action No. 881

MIAMI TRANSPORTATION COMPANY, INC., OF INDIANA, a corporation,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

LINDLEY, *District Judge*, concurring in part and dissenting in part:

Plaintiff sues under the Urgent Deficiencies Act, 28 U. S. C. sections 41 (28), 43-48, to set aside a portion of the order of the Interstate Commerce Commission dated September 27, 1944, under which the Commission authorized plaintiff, under the socalled "grandfather" clause of Sec-

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tion 206 (a) of the Interstate Commerce Act, to operate in interstate or foreign commerce, by motor vehicle over certain regular routes but denied wider authority to plaintiff in so far as it sought to operate on additional routes described as follows:

Route A, between Cincinnati and Pittsburgh, Pa., over U. S. Highway 22.

Route B, between Cincinnati and Pittsburgh, over Ohio Highway 4 to Middletown, Ohio, thence over Ohio Highway 73 to its junction with U. S. Highway 25, thence over U. S. Highway 25 to Dayton, Ohio, thence over Ohio Highway 4 to its junction with U. S. Highway 40, thence over U. S. Highway 40 to Columbus, thence over Ohio Highway 16 to Coschocton, Ohio, thence over U. S. Highway 36 to Cadiz, Ohio, and thence over U. S. Highway 22 to Pittsburgh.

Route C, between Cincinnati and Pittsburgh, over U. S. Highway 50 from Cincinnati to Clarksburg, W. Va., thence over U. S. Highway 19 to Morgantown, W. Va., thence over U. S. Highway 119 to Uniontown, Pa., and thence over Pennsylvania Highway 51 to Pittsburgh.

Route D, between Delaware, Ohio, and Portsmouth, Ohio, over U. S. Highway 23.

Route E, between Charleston, W. Va., and Weirton, W. Va., over U. S. Highway 21 from Charleston to Parkersburg, W. Va., and thence over West Virginia Highway 2 to Weirton.

Route F, between Indianapolis and Cleveland, over U. S. Highway 36 from Indianapolis to Pendleton, Ind., thence over Indiana Highway 9 to Anderson, Ind., thence over Indiana Highway 32 to Muncie, Ind., thence over Indiana Highway 3 to Hartford City, Ind., thence over Indiana Highway 22 to Jonesboro, Ind., thence over U. S. Highway 35 to its junction with Indiana Highway 9, thence over Indiana Highway 9 to Huntington, Ind., thence over U. S. Highway 24 to New Haven, Ind., thence over U. S. Highway 30 and 30S to Mansfield, Ohio, and thence over U. S. Highway 42 to Cleveland.

Serving all intermediate points on the above described routes, and as off-route points Speedway City and Fort Benjamin Harrison, Ind.; all points in the Cincinnati commercial zone as defined in Cincinnati, Ohio Commercial Zone, 26 M. C. C. 49; all points within 25 miles of Cleveland; all points within 35 miles of Pittsburgh; and all points within 25 miles of Charleston.

Section 206 (a) provides that a common carrier by motor vehicle which engages in interstate commerce, shall procure from the Commission a certificate of public convenience and necessity for its operations, provided, however, that if any such carriers, or its predecessor in interest, was bona-fide in operation on June 1, 1935, over the routes for which application is made and has so operated since that time, the Commission shall issue its certificate without further proof that public convenience and necessity will be served by such operation. The Commission, in so far as it granted relief, found that plaintiff had brought itself within the statute by proving operations in 1935 and since, over certain specified routes, but concluded that as to the routes denied, plaintiff had failed to sustain the proof required by the statute.

Plaintiff complains because the Commission denied it the right to transport general commodities, except livestock, explosives, sand, gravel, coal and lumber, over the aforementioned refused routes, and to all intermediate points thereon. Its contentions are, first, that the Commission unlawfully, arbitrarily and capriciously denied plaintiff the right to operate over the routes mentioned, in view of alleged uncontroverted evidence of record showing that plaintiff had operated over the routes and in the territory involved on, before and continuously since June 1, 1935, and, second, that the Commission unlawfully, in its final order, deprived plaintiff of the right to operate on the Cincinnati-Charleston route previously granted.

Obviously, whether plaintiff and its predecessor used the routes in 1935 and continuously thereafter is a question of fact, no satisfactory disposition of which can be made until the evidence upon which plaintiff relies is scrutinized carefully in order to determine whether it was of such character

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as inevitably led to the conclusion that plaintiff urges. In other words, if the evidence before the Commission was controverted and that supporting the Commission's finding is substantial, we have no right to interfere; but if the evidence was of such character as to permit of only one conclusion, that is, that plaintiff has made uncontroverted proof of the use, then plaintiff is entitled to relief.

Plaintiff has submitted evidence of some 160,000 shipments of freight subsequent to 1935, which it claims passed over the routes involved, as proof of continuity of operation. All this evidence, it insists, the Commission ignored. In view of the fact that none of the parties has presented an analysis of the evidence, in so far as its applicability to the respective routes involved is concerned, I have found it necessary to formulate a rather laborious analysis myself. I shall briefly consider the evidence, thus analyzed and correlated, in so far as it is applicable to each of the respective routes.

In support of the use of Route A, exhibit 6 shows 5 shipments from McKeesport, in the neighborhood of Pittsburgh, to Circleville, 5 to Wilmington and 4 to Washington C. H., all Ohio towns on Route A; exhibits 4, 7A, sheet 29, shipment from Covington, Ky., just across the river from Cincinnati, to Zanesville, Ohio, on Route A; sheet 32, 2 shipments from Covington, Ky., to Steubenville, Ohio, on Route A; sheet 33, shipment from Chillicothe, Ohio, to Butler, Pa., which might have gone over Route D to Circleville and thence on Route A to Pittsburgh; sheet 33A, shipment from Covington to Cambridge on Route A and from Covington to Zanesville on Route A; sheet 50, shipment, from McKeesport, Pa., to Circleville, Ohio, and to Wilmington, Ohio, both on Route A; sheet 51, shipments from McKeesport to Washington C. H. and Circleville, Ohio, both on Route A; sheets 52, 53 and 4, shipments from Pittsburgh to Zanesville, Wilmington, Circleville and Washington C. H., on Route A and from Cincinnati to Zanesville, on Route A; sheets 56 and 63, shipments from Pittsburgh and McKeesport to Circleville, Washington C. H. and Wilmington, on Route A. Exhibits 6, 6A show 65 shipments from Pittsburgh and McKeesport, Pa., to Circleville, Wilmington and Washington

C. H., on Route A; exhibit 7, 7A and 72, innumerable shipments from Cincinnati and Pittsburgh, or towns within their zones, to many points on U. S. 22 on Route A, including 46 shipments to Washington C. H., 31 to Circleville and 2 to Wilmington.

In addition to these shipments similar others are disclosed in the multiplicity of exhibits. Plaintiff shows checking stations on Route A at Cincinnati, Ohio, and Washington C. H.

Robert C. Jones, manager and former truck driver of the company, testified that he was a truck driver for plaintiff and its predecessor from 1934 to 1940; that during and after the spring of 1935, he drove trucks every day from Cincinnati to Pittsburgh and return on U. S. 22, Route A.

As to Route B, which is an alternative route from Cincinnati to Pittsburgh, by way of Hamilton, Columbus, Coshocton and Cadiz, I find the following evidence: Exhibit 6 shows 11 shipments from McKeesport to Middletown, Ohio, on Route B; exhibit 6A shipments to Columbus, Ohio, on Route B; exhibit 7, sheet 2, shipments from Pittsburgh to Portsmouth, Ohio, which might have been sent over either Route B or C; exhibit 7A, sheet 34, shipments from Coshocton, Ohio, to Indianapolis, indicating use of Route B from Coshocton to Columbus; sheet 4, shipment from Newport, Ky., to Columbus, Ohio, on Route B; sheets 53, 58 and 60, shipments from Pittsburgh to Newark, Ohio, on Route B; exhibit 8, ten shipments of general commodities from Pittsburgh to Columbus, Ohio, on Route B, 10 shipments from McKeesport to Middletown on Route B and six shipments from Pittsburgh to Newark on Route B; exhibit 6, 4A, shipment from Newport to Middletown on Route B and shipments from Newport to Columbus on Route B; exhibit 6A, 45 shipments from McKeesport to Middletown on Route B and many shipments from the Pittsburgh zone to Columbus on Route B; exhibits 8, 8A, 8B and 8C, 175 shipments from Cincinnati to Middletown; 400 to Dayton; 50 to Springfield; 850 to Columbus, 60 to Newark, 10 to Coshocton, all on Route B, and hundreds of shipments originating beyond Cincinnati or Pittsburgh to points on Route B; exhibit 12, 15A, shipments from St. Louis to Springfield, Ohio, and 290 ship-

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ments from Springfield to Pittsburgh, which plaintiff claims shows proof of use of Route B. There is proof also of a checking point for Route B at Cincinnati and other evidence of shipments to points on Route B. Jones testified concerning Route B that he drove from Cincinnati on Highway 4 to Middletown, then on 73 to its junction with 25, thence on 25 to Dayton and that he drove from Cincinnati to Columbus, Coshocton and Cadiz, all on Route B.

As to Route C, which is another alternative route from Cincinnati to Pittsburgh over U. S. 50 from Cincinnati to Clarksburg, W. Va., thence over U. S. 19 to Morgantown, W. Va., thence over U. S. 119 to Uniontown, Pa., and thence over Pennsylvania Highway 51 to Pittsburgh; exhibit 4 and 4A show shipments to Clarksburg, W. Va., and Parkersburg, W. Va., both on Route C; exhibit 7, sheet 2, shipment from Pittsburgh to Portsmouth, Ohio, which may have been part way by Route C, and shipment from Pittsburgh to Milford, Ohio, on Route C; exhibit 9, 53 shipments between Cincinnati and Parkersburg and Clarksburg, W. Va., on Route C; exhibit 9A, 2000 shipments from Cincinnati to Parkersburg on Route C; exhibits 11 and 11A some 350 shipments from Cincinnati to Wheeling, W. Va., indicating travel from Cincinnati to Parkersburg on Route C and then to Wheeling on Route E; exhibits 6, 4A, 24 shipments from Newport or Covington to Clarksburg or Parkersburg on Route C; two shipments from Norwood to Clarksburg; one from Cheviot to Clarksburg; four from Newport or Covington to Chillicothe, on Route C; exhibit 9, 450 shipments to Parkersburg, W. Va., and 250 shipments to Clarksburg, W. Va., originating either in Pittsburgh or Cincinnati and numerous shipments from points beyond Pittsburgh or Cincinnati to Parkersburg, Clarksburg and Chillicothe, which are on Route C; exhibit 11, 132 shipments from Cincinnati to Wheeling, W. Va., which may have traveled on Route C to Parkersburg and then on Route E to Wheeling.

There was evidence of other shipments which might have passed over Route C and evidence that plaintiff and its predecessor maintained checking stations at Cincinnati and Chillicothe. Jones testified that he traveled over Route C from Cincinnati to Parkersburg, W. Va., and Clarksburg, W. Va.

As to Route D, without discussing the evidence in detail, shipments were made, which plaintiff insists necessarily traveled over the route. It is possible that these shipments went along the route but there is nothing in the exhibits to show that such was the course. Indeed, in most cases, there is a much more direct route. Jones testified that he drove Highway 23 from Portsmouth to Delaware, Ohio. All in all, I agree that the evidence is too uncertain and conjectural in character to prove plaintiff's use of Route D.

As to Route E, plaintiff insists that shipments must have gone over the route. However, I agree that there is nothing other than conjectural evidence of use of the route. A checking station was maintained on Route E at Marietta, Ohio. There is no specific testimony on the part of Jones that he traveled on Route E but he did testify that he drove all the routes. I concur with the majority in the conclusion that the evidence is insufficient to prove use of Route E.

As to Route F, again I shall not prolong this memorandum by recital of all the evidence offered in support of its use, for I concede that the Commission was fully justified in its conclusion that the necessary proof had not been made.

On this analysis of the evidence I am convinced that plaintiff made a clear *prima facie* case under its application, in compliance with the statute, for the use of Routes A, B and C. The multiplicity of shipments to points on the respective routes, coupled with the direct oral testimony of the use of the specific routes being undenied. I think the Commission could not rightfully ignore the evidence and that, in the absence of any controverting facts, it follows that the order, in so far as it denied plaintiff's application with regard to Routes A, B and C, is not supported by substantial evidence. As to Routes D, E and F I agree that plaintiff failed to prove its averments and that, as to them, its complaint must be denied.

Plaintiff's further contention is that the Commission wrongfully excluded authorization of operations over a route between Cincinnati, Ohio, and Charleston, W. Va., which had been granted in an earlier order but which the

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Commission in the order now complained of took away from plaintiff. The Commission did this because it found that Miami (Ohio) and the present plaintiff were, at the time of proceedings being conducted as one transportation business and, inasmuch as it had previously granted authority to Miami (Ohio), it was thought best, in order to prevent duplication of service, to deny authority to plaintiff. Plaintiff does not deny that the two companies are commonly owned and operated.

The Commission's authority is defined in Rochester Telephone Co. *v.* U. S., 307 U. S. 125. The court has there limited the judicial function by saying that it is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. The Commission has in various cases defined fully its position that duplicate operating rights in identical parties are not to be granted. Greyhound Lines Common Carrier Application 41 M. C. C. 153; Pennsylvania Truck Lines, Inc., Common Carrier Application, 41 M. C. C. 607; C. A. Conklin Truck Line, Inc., Purchase, 37 M. C. C. 467; Savin Common Carrier Application, 41 M. C. C. 185; I Becker & Sons, Inc., 31 M. C. C. 623; Southwestern Transportation Company, Purchase, 35 M. C. C. 437, 442, 443; Elliott Bros. Truck Company *v.* U. S., 59 F. Supp. 328. Acting under its conception of the proper method of discharge of its functions, the Commission has established the rule forbidding duplication of authority. The evidence in this case plainly justifies application of the rule, unless it can be said, as a matter of law, that the rule is *per se* an improper one. I agree with the majority that we are not justified in making such an announcement. The Commission having found that the two companies were commonly owned; that authority had been granted to one of them and that the two companies were rendering one service, and having concluded, as a result, that it was beyond administrative wisdom to grant additional authority over this to the other of the commonly owned companies, I think, as the Supreme Court indicated in Rochester Telephone Co. *v.* United States, *supra*, to annul the action taken would be to travel beyond our proper judicial functions. Our only task is to discover whether there is a rational basis for

the conclusions approved by the administrative body and, having found that there is, we are powerless to substitute our judgment.

I conclude that the complaint should be denied as to all prayers for relief except as to that part of the order of the Commission which denied authority for use of routes A, B and C; and that as to that, plaintiff should prevail.